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IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO GOVERNMENT'S OPPOSITION

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Nothing could better demonstrate the need for review of this case as a conspiracy case than the fact that the government's own brief, in stating the evidence deemed sufficient to connect an individual defendant with the alleged conspiracy, relies (without disclosing such reliance) on statements made outside the presence of the defendant sought to be implicated thereby.[1]

Nothing could better demonstrate the need for review of the constitutional issue in this case, if it be reached, than the fact that the government, in seeking to avoid the constitutional questions so plainly raised by *United States v. Archie Brown*, 381 U. S. 437, and *Aptheker v. Secretary of State*, 378 U. S. 500, takes the position that anyone charged with making a false statement to the government may not question the validity of the statute or other authority under which the statement is required to be made—

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[1] Government's brief in opposition (hereinafter cited as Opp. 4-5) (Sanderson); *infra*, pp. 8-9. The petition for certiorari is hereinafter cited as "Pet."

a position the obvious and alarming implications of which the government leaves unexplored and unmentioned.[2]

1. *Statutory Insufficiency of the Indictment* (Opp. 6-10). With respect to the statutory insufficiency of the indictment, the fallacy of the government's position is illustrated by its describing as an "acknowledgment" (Opp. 6) petitioners' statement (Pet. 8) that "the indictment explicitly charges a conspiracy to defraud the United States . . .". This misses the whole point, for the teaching of *Bridges* v. *United States*, 346 U. S. 209, is that even though an indictment "explicitly charges" a conspiracy to defraud the United States, the charge is insufficient if the language "merely cloaks" a factual charge of conspiring to commit an offense of which fraud is not an essential element (Pet. 9).

The government (Opp. 8-9) lays great stress on the "broad reach" of the Federal Conspiracy Statute (18 U. S. C. 371)—a breath which petitioners in no way challenge. The sweep of the injunction against conspiring to defraud the United States may be as broad as you please, but still the indictment must factually charge that fraud was an essential element of the conspiracy's object.[3]

The present indictment, like that in the *Bridges* case, fails to do this. No doubt the government has a "legitimate interest in having its laws operate . . . on the basis of truthful rather than falsified information" (Opp. 9). But if obstructing that interest, without more (*i.e.*, the essential

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[2] Opp. 10-13; *infra*, pp. 3-4.

[3] Refusal to recognize this basic rule, as established by the *Bridges* case, accounts for the government's bland assertion (Opp. 8, n. 2), that *United States* v. *Grainger*, 346 U. S. 235, "has no bearing on the present case", although the *Grainger* case embodies reasoned dictum (346 U. S. at 241-3) that fraud is not an essential element of the statute (18 U. S. C. 1001) petitioners are charged with conspiring to violate, as was expressly held in *United States* v. *Luric*, 222 F. 2d 11 (CA 7), not mentioned by the government.

element of fraud), were enough to ground an indictment under the fraud clause of 18 U. S. C. 371, the *Bridges* case should have been decided otherwise.[4]

Regarding the trial court's erroneous failure to charge the jury that a finding of fraudulent intent was an essential element of the offense (Pet. 10-11 and 31), the government now contends (Opp. 22) that this objection "was not made in the Trial Court . . . and therefore may not be considered here". This suggestion is amazing, inasmuch as petitioners explicitly and unsuccessfully requested the judge to charge that no defendant could be convicted absent a finding that he "conspired with other defendants to bring about the filing of such false affidavits with intent to defraud the United States" (No. 7, R. 1121).[5]

2. *Constitutional Insufficiency of the Indictment* (Opp. 10-14). Seeking to avoid the constitutional problems underlined by the *Archie Brown* and *Aptheker* cases, the government now raises a new contention that petitioners lack standing to challenge the constitutionality of Section 9(h) of the Taft-Hartley Law, on the ground that one charged with making false statements to the government cannot challenge the validity of the authority pursuant to which the statement is required (Opp. 10-13). This argument is quite without merit. In the two cases chiefly relied on by the government—*United States* v. *Kapp*, 302 U. S. 214, and *Kay* v. *United States*, 303 U. S. 1—the defendants had

[4] The government's arguments on the statutory sufficiency of the indictment are wholly formal, and do not touch the practical difference between conspiracies to defraud and conspiracies to commit offenses, remarked in the petition (Pet. 10).

[5] Even had this charge not been requested and denied, reversal would be required inasmuch as the judge was bound to charge the jury with respect to the essential elements of the offense, and a failure so to do is plain and prejudicial error which an appellate court should notice. *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 411-12; *United States* v. *Raub*, 177 F. 2d 312 (CA 7).

made false statements for the purpose of obtaining financial benefits from the government—benefit payments under the Agricultural Adjustment Act in the *Kapp* case, a loan from the Home Owners Loan Corporation in the *Kay* case. But in the present case, although the fruits of the alleged conspiracy are described in the indictment (R. 4) as "services and facilities of the National Labor Relations Board", it is clear that these are in no sense "benefits" or "bounties". Rather they were incidents of a regulatory scheme which imposed restrictions on those seeking to use the Board.

The principles of the *Kapp* and *Kay* cases have no application where the defendant is seeking no special statutory benefit, but is engaging in conduct or exercising rights which would be open to him in the absence of the unconstitutional statute under which the allegedly false statement is required. If election officials unlawfully require voter registrants to disclose their race, educational attainments, or other matters, could persons prosecuted for false answers not challenge the validity of the questions? If regular income tax exemptions were made conditional upon a statement that the signatory was not of a particular religious persuasion, could he be prosecuted for making a false response? It is not enough to say that unauthorized questions need not be answered at all, for many would answer out of ignorance or fear, or under official pressure.

The implications of the government's argument are so alarming that it is difficult to believe that the position taken in its brief embodies the considered view of the Department of Justice. We respectfully suggest that it should be given no trace of judicial countenance.

3. *Production of Grand Jury Minutes* (Opp. 14-16). The government's entire treatment of *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, is bottomed on the false proposition that it applied the requirement of "particularized need" to the production of grand jury

minutes to the judge *in camera*, when in fact it applied the requirement only to production of the minutes directly to the defense. The opinion leaves no room for such misinterpretation, as it explicitly left open the basis upon which a request for examination of the minutes *in camera* should be treated (360 U. S. at 401).

With respect to the considerations affecting certiorari, the government takes the remarkable position (Opp. 15-16) that a mounting divergence of practice among the several circuits (Pet. 14-16) is unworthy of this Court's attention. In fact, at least twice before the Court has granted certiorari in cases raising this question and has heard argument on it. *Travis* v. *United States*, 364 U. S. 631, and *Parr* v. *United States*, 363 U. S. 370, both decided on other grounds.

In any event, abundant "particularized need" was shown in this case, and the government makes no effort to show the contrary other than by the assertion (Opp. 15) that "petitioners appear to concede" a lack of such a showing—an utterly baffling statement in view of petitioners' detailed description and argument in support of the showing (Pet. 15, n. 16).

4. *Exclusion of Business Records* (Opp. 16-17). The government does not argue that the Dichter expense vouchers (Pet. 16-19) were properly excluded, and restricts itself to the *ex cathedra statement* (Opp. 17) that the exclusion "did not prejudice the defense".[6] This disparagement of the significance of the vouchers rings false, when compared with the emphasis placed by prosecution counsel, addressing the jury, on the importance of the prosecution testimony of Locke, which the vouchers would have shown to be false (Pet. 19).

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[6] The government's other comment that the vouchers related to a "collateral matter" (Opp. 17) is obscure and, in any event, quite incorrect, inasmuch as the evidence embodied in the vouchers directly controverted direct and significant testimony of the prosecution witness Locke (Pet. 16-19).

5. *"Vicarious Admissions" and "Furtherance"* (Opp. 20-22). The government takes the position that, in a conspiracy trial, it is for the jury and not the trial judge, to determine whether or not particular "vicarious admissions" were made in "furtherance" of the conspiracy (Opp. 20). No authority is cited [7] for this remarkable notion, for the very good reason that there is none. The rule has been universal that this is a question for the trial judge, and the government found no recourse except to shut its eyes to the contrary authorities (Pet. 22). Furthermore, the rule is sound; however difficult it may be for the trial judge to rule on the point in a case such as the present one, where the government's evidence is comprised of numerous such declarations, it would be far more difficult—indeed, quite impossible—for the jury to perform this task.

What is most remarkable is that the government took a contrary (and the proper) position on this very issue in its memorandum in a case decided at the last term of this Court. *Baxa* v. *United States*, 381 U. S. 353. There, one of the co-conspirator defendants had made admissions which, as here, the trial court allowed the jury to consider against the other defendants. Conceding that these admissions were not made in furtherance of the conspiracy, [8] the government agreed that the testimony was "inadmissable" against the other defendants, who were therefore entitled to have the jury instructed accordingly. See the Memo-

[7] There is a citation to a page from a law review article (Opp. 21), but the article in question contains nothing that can possibly be construed as supporting the government's argument; indeed, its implications are strongly to the contrary. *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 985 (1959).

[8] The government said in its memorandum (pp. 8-9) that it was "probable" that the conspiracy had come to an end before the admissions were made, but agreed that even if this were not so and the statements were made during the conspiracy's pendency, they were plainly not in "furtherance" of the criminal enterprise.

randum for the United States in No. 957, October Term, 1964, *Baxa* v. *United States*, at pp. 8-9.

On this basis the government confessed error and invited reversal in the *Baxa* case, and this Court reversed on the same ground. The decision is directly applicable to the present case, and one can only wonder that it is not even mentioned in the Government's brief (Opp. 20-21).

6. *Admission of Record of Deceased Witness' Testimony at Prior Trial* (Opp. 17-19). The government's justification for the receipt in evidence of the record of Mason's testimony at the first trial is based on the false proposition that because Mason was not examined on *voir dire* under 18 U. S. C. 3500 at the first trial, the defense cannot now complain that he was unavailable for *voir dire* at the second trial (Opp. 19). The proposition is false because the government appears to be unaware of the purpose of *voir dire* under Section 3500.

At the first trial, the government represented that there were no documents relating to Mason's testimony which raised an issue of producibility under Section 3500 (Pet. 25 and R. 345-46). On the basis of that representation (which the defense was in no position to challenge), there was no reason or basis for conducting a *voir dire* examination of Mason.

At the second trial, and because of the intervening decisions in *Campbell* v. *United States*, 365 U. S. 85 and 373 U. S. 487, and *Bary* v. *United States*, 292 F. 2d 53 (C. A. 10), the prosecution brought forth numerous documents which raised an issue of producibility under Section 3500. But those issues could not be satisfactorily resolved at the second trial, because Mason was no longer available for *voir dire* examination (Pet. 25-26).

The government never faces up to this consideration, and therefore everything it says on this point is wide of the

mark. A similar flaw vitiates its justification of the trial court's failure to call the government attorney Foley (then stationed in Washington), by arguing that the statement resulting from his interview with Mason was not "producible" (Opp. 19). The question of its producibility could not be resolved without *voir dire* examinations of Foley and Mason, but the former was not called because he was too far away, and the latter was dead (Pet. 26-27).*

7. *Insufficiency of the Evidence* (Opp. 2-6 and 22-25). The essential difficulty with the government's treatment of the evidence is its failure to take account of the evidentiary rules applicable to conspiracy trials. It is useless for this Court to lay down rules such as those enunciated in *Ingram* v. *United States*, 360 U. S. 672 (Pet. 30), if trial courts refuse to embody its teaching in jury instructions (Pet. 31) and government briefs treat those teachings only with silence.

How easy it is for courts and prosecutors to ignore or overlook supposedly basic safeguards is amply demonstrated by the government's treatment of the case against the petitioner Sanderson. Thus it is stated (Opp. 4) that "all six petitioners [thus including Sanderson] attended Communist Party meetings" in the year 1948. The only record citation given by the government affecting Sanderson is to an account of a Communist meeting at the petitioner Travis' home (R. 87). But the only basis for an inference that there was a Communist meeting is a statement said to have been made by Travis (R. 86) when Sanderson was not present.

Subsequently the government (Opp. 5) declares that "Sanderson was given the job of conducting the activities of Communists on Mine-Mill's staff, including the collection

* The affidavit referred to in the government's brief (Opp. 19) is *not* a statement resulting from Foley's interview with Mason (R. 208-14 and Pet. 26-27).

of Party dues (R. 472; see also R. 304-05)." The first reference, again, is to a conversation at which Sanderson was not present (R. 472); the second is to a Mine-Mill document imposing certain duties on Sanderson, which of course says not a word about Communists or their Party dues or activities (R. 304).

CONCLUSION

For the reasons sets forth in the petition and in this reply the petition should be granted.

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